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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE MERITS OF THE CASE IS CORRECT.

Upon the appeal to the United States Circuit Court of Appeals the appellant there, United States Fidelity and Guaranty Company, assigned three errors. They are as follows (Record pp. 48-49):

1. The trial court erred in denying appellant United State Fidelity and Guaranty Company's motion for a directed verdict, and in refusing to direct the jury to render its verdict in favor of the appellant

as to the double indemnity claim of the plaintiff under the policy of insurance involved in the action.

2. That the verdict of the jury is not sustained by the evidence.

3. That the court erred in refusing to give to the jury instructions requested by the appellant, Nos. 2, 4, 5, 6, 7 and 8, which instructions were duly requested of the court to be given to the jury, and which request was refused, and which refusal was duly excepted to by the defendant in the presence of, and before the retirement of, the jury to deliberate upon its verdict.

These instructions appear at pages 49, 50, 51 and 52 of the record in this court.

These errors are reassigned here.

The Circuit Court of Appeals found it unnecessary to consider the second and third assignments of error, inasmuch as it found the first assignment sufficient to reverse the judgment upon the ground that the undisputed evidence showed as a matter of law that the assured decedent, Aschenbrenner, was not a passenger at the time of the accident, and therefore not within the double indemnity provisions of the policy involved. These assignments have therefore never been passed upon.

The contention of the appellant was, in brief, that the word "passenger," as used in the formal written insurance contract, should be given its ordinary signification, as that signification appears in the law of carriers, because the pertinent provision of the double indemnity clause is:

> "(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

The contention of the respondent Aschenbrenner was that the word "passenger" should receive a broader definition than this, one at least sufficiently broad to include the decedent in this case, but the precise limits of this definition have never been fixed by the respondent nor have the criteria by which it could be determined been suggested. In its brief in this court, at page 13, the respondent says, in speaking of the use of the word "passenger" in the policy involved:

> "Instead of using the word 'passenger' in any limited sense, the effort to use that term in its ordinary and popular sense is manifest."

Just what that ordinary and popular sense is, the petitioner does not make clear. In the sentence immediately following this one she seems to infer that anyone upon a passenger train, regardless of his condition, or regardless of how or when he got there, or on what part of the train he may be riding, if he has paid or expects to pay his fare, is a passenger. According to this view, one riding upon the brake beams who expected to pay his fare at some time during the journey, would be a passenger, and likewise one riding on top of the train. Although the petitioner does not fix it, she appreciates that somewhere there must be a limitation upon the definition of passenger of which she is speaking by stating: "The company did not intend to insure the policyholder if traveling as a tramp riding surreptitiously the brake beams of a railroad car, or if traveling as an employee of the

carrier, such as a train brakeman or as a railway postal clerk." There is no more reason for excluding these classifications from the petitioner's concept of the term "passenger" than there is for including the decedent in the concept. The petitioner appreciates that she is obliged to extend the meaning of the word "passenger" beyond that accorded it in the law of carriers, and accorded it with relation to public conveyances for passenger carriage, and appreciates further that the definition must not be made so broad or extreme as to be untenable, and therefore is put to finding some midway ground between the definition accorded the word in the law of carriers and the extreme definition to include anyone traveling upon a railroad train regardless of the circumstances or the place. To meet this dilemma the petitioner has arbitrarily fixed a definition to meet her own ends, and this definition finds no substantiation in any of the decided cases, as we shall point out in alluding to the cases cited by the petitioner.

The Circuit Court of Appeals rejected this concept of the petitioners, the respondent in that court, and stated what seems to be inescapably sound, that the word "passenger" as used in the policy involved, should be given the ordinary significance which it has in the law of carriers.

In this connection we wish to especially emphasize the wording of this important provision in the policy:

> "While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

It is impossible to conceive how the insurance company could have more explicitly stated that this double indemnity provision extended only to passengers on a public conveyance operated by a common carrier for passenger service than it has done here. The word "passenger" is used only with relation to a public conveyance and to one provided by a common carrier for passenger service, and is expressly limited to persons on such a conveyance. If the wording had gone only so far as to say that "while a passenger", there would be more strength to the contention of the petitioner that the meaning was not restricted to passengers on a public conveyance operated by a common carrier for the purpose of carrying passengers. The wording does not stop there. It explicitly states that the character of "passenger" which the double indemnity provisions cover to be one who is such with relation to the common carrier and therefore the source to which to look to determine whether that relationship has accrued is to the law of carriers. It was to that law that the Circuit Court of Appeals looked. That the Circuit Court of Appeals was correct is recognized by many cases, among them the one cited by the petitioner here at page 12 of its brief, namely, *Berliner v. Travelers Ins. Co.*, 121 Cal. 458. The Circuit Court of Appeals quotes from that case, the language quoted being:

> "These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word 'passenger' as here used is evidently intended to designate the character or relation the insured

> sustained to the proprietor of the conveyance, and are therefore in point."

The Circuit Court of Appeals further quotes from the case of *Quinn v. New York Life Ins. Co.*, 195 N. W. 427, 428, in which the Supreme Court of Michigan states:

> "It is further contended that, as between plaintiff and the defendant, a different rule should be applied than between the plaintiff and the street car company on the question whether the insured was a passenger at the moment he was struck.
>
> Considering the last question, we are unable to see why any distinction should be made between the insurance company as a defendant and the street car company. At the time the provision, 'while traveling as a passenger on a street car', etc., was adopted by defendant and made part of its contract, that phrase had well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the courts was well understood and considered by defendant before making it a part of its double liability, and it was well known by both parties when the contract was made that, should the parties afterwards disagree upon the question of liability, the courts would probably give the language the same construction they had given it in cases where transportation companies were defendants. We cannot agree with defendant in this suggestion."

In fact, no case has been cited where the question has been squarely presented to the court deciding it, in which it has been held that the word "passenger" as used in an insurance policy is not to be given the same

meaning that it is given in the law of carriers where a railroad company is the defendant.

The insurance company here agrees to pay a doubly indemnity for a single premium. The only reasonable ground on which it could do this is that the hazard or risk for which it pays the double indemnity is reduced proportionately. This risk is so reduced, when one acquires the status of a passenger upon a common carrier, because of the innumerable safeguards with which the carrier surrounds its passenger. The risk of accident is not only not reduced below the ordinary (and it is for accident sustained from the usual or ordinary risk that the single indemnity is paid) when one is in the act of boarding a moving train, it is increased many fold. It is common knowledge that in boarding a moving train the hazard is great and the accident ratio exceedingly high, and yet the petitioner asks that this policy be so construed that for a risk greater than the ordinary risk and for which only the single indemnity is payable, the double indemnity should be paid. As the Circuit Court of Appeals points out, not only is the rule of law in favor of the respondents here, upon the meaning to be given to the word passenger, but the reason for the meaning, as appearing from the argument just preceding, is equally strong in its favor.

There is no doubt whatever that were a railroad company the defendant here, any court to which the facts might be presented would hold as a matter of law that the deceased had not become a passenger at the time that he slipped from the steps. The authorities are practically unanimous to that effect. The fact

that an insurance company is the defendant should not and does not alter the rule. Insurance companies do not carry passengers. There is no such thing as a passenger with relation to an insurance company. That relation is determined only as between the assured and the carrier. Here, as the Circuit Court of Appeals points out, the status of passenger did not attach to the decedent because he did not gain a place of safety and did not leave the hazard inherent in the act of boarding a moving train, behind him.

There is one point in the petitioner's brief, at page 6, where there appears to be some confusion between the question of when one has become a passenger and the question of when a passenger is guilty of contributory negligence. The question of contributory negligence has never been involved in the case at bar. The United States Fidelity and Guaranty Company has always conceded that the question was not involved and was not a defense under the policy, and those carrier cases in which the question of contributory negligence was involved were accordingly eliminated from consideration. In an action against a common carrier by one claiming to be a passenger, there are always two questions to be answered; first, has the person become a passenger so as to be entitled to all the protective measures afforded passengers, and second, if so, has he been guilty of contributory negligence in connection with his injury. In each of the cases selected by the respondent here and cited to the Circuit Court of Appeals as bearing upon the meaning of the word "passenger", the court did not find it necessary to pass upon the question of

contributory negligence of the injured person, because it found at the threshold of the inquiry that he had not become a passenger.

The rule announced in the cases (and the authority is overwhelming, in favor of the rule) that one who makes an attempt to board a railroad train after it has commenced to move does not become a passenger until he reaches a place of safety thereon, and the hazard attendant upon the attempt be left behind him. If in the course of the attempt he slips, is pushed off, brushed off, knocked off, or falls off, he has not acquired the status of passenger. The cases lay no emphasis on the manner of his getting off, holding simply that if in making the attempt he is hurt or killed, he is not a passenger. The cases cited by the respondent, United States Fidelity & Guaranty Company, are cases in which, because of the unsuccessful attempt, it was held as a matter of law that the person making the attempt had not become passengers. The only authority found to the contrary, and that one is cited by the petitioner, and chiefly relied upon by it, is the case of *Fidelity and Casualty Company v. Morrison*, 129 Ill. App. 360. This case stands alone. It has never been cited as authority in any other court, so far as we can discover; it has never been considered by the Supreme Court of Illinois, and is so wholly at variance with the overwhelming weight of authority upon the question that it is entitled to no weight. The opinion of the Circuit Court of Appeals and this brief contain the authorities relating to the question and it is unnecessary to recite them, as they are fully discussed there.

Policies of accident insurance often differ in wording. Some of them cover the assured while travelling upon a common carrier or riding upon a railroad train. Some of them expressly exclude from the coverage a *passenger* if he is on the platform, running board, or steps of the train, and some of them, as does the policy here, extend the protection of the double indemnity provision to a *passenger*, and in order to remove any ambiguity, expressly extend it to him while on the running board, platform or steps of the conveyance. He must, however, be a passenger in order to come within its terms. As the Circuit Court of Appeals points out in the following language:

> "The appellee insists that full force should be given to the words 'platform, steps, or running board'. In this contention, the appellee is quite correct. But equal force should be given to the words 'while a passenger'. If the appellee has not brought herself within *all* the conditions precedent to recovery under the policy, she cannot be awarded double indemnity."

What the petitioner here in reality asks is not that the definition of the word "passenger" be extended, but that the word "passenger" be dropped out of the language of the policy altogether, and that in legal effect the clause be left to read:

> "(1) While in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

As the Circuit Court of Appeals points out, quoting from the case of *Ripley v. Insurance Co.*, 83 U. S. 336, 338:

> "The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used?"

The petitioner in her brief, at pages 7, 8 and 9, attempts to show that the reason upon which the Circuit Court bases its opinion is not applicable to the case at bar, by pointing out that the authorities selected by the petitioner to make the point (though they are by no means all the cases cited in that court) are discussing persons inside the car. There are two answers to this argument. The first is, that what is ascribed by the petitioner as the reason expressed by the Circuit Court for its opinion as to what the word "passenger" means, is only one of the reasons of the court for reaching its conclusion, and we should say, not the principal reason. The principal reason upon which the Circuit Court relies is, that within the meaning of the word "passenger", as used in the contract, the assured never became a passenger and, therefore, regardless of all other considerations, was not within the double indemnity provision of the policy. A secondary reason assigned, is that to which the petitioner alludes, namely, that the reason for the rule is in favor of the insurance company in the case, as well as is the rule itself, in that the risk while one is a passenger is greatly less than while one is attempting to board a moving train and has not become such. It happens, incidentally, that in the particular cases which the petitioner selects to make its point of those cited by the Circuit Court of Ap-

peals, the example discussed is that of one who is within a car or seated inside a car. The error of the argument, however, lies in the refusal of the petitioner to extend the rule discussed by the court to its proper limits. The degree of care owed to a passenger by a carrier, regardless of where he is, so long as he is a passenger, is a very high one. The degree of care owed to one attempting to board a moving train is practically none at all, except to refrain from a wilful injury. The hazard is indeed great to one making such an attempt, and far greater than to one who has become a passenger on a train, even though having become such he be on the platform, or on the steps, or on the running board. He has left, when he becomes a passenger, the hazard of the act of boarding behind him. He has gained a condition of safety and security which he never had while in the act of boarding. The fact that one occupies a safe position while inside the car, as announced in the authorities mentioned by the petitioner in its argument, derogates not at all from the proposition that one who has acquired the status of passenger on the train, regardless of whether he is on the steps or on the running board, or on the platform, or inside the coach, is in a far safer position than one who has not acquired such status, for one very compelling reason alone, namely, that the carrier thereupon owes him the very highest degree of care and will demean itself accordingly.

The ultimate and significant fact is that one a passenger has innumerable safeguards about him for his protection, and that one a bare licensee or a

trespasser has none at all, and this very element, even though the two persons who might be under consideration occupy the very same physical position upon the train, makes the hazard to the licensee or trespasser very great indeed, and the hazard to the passenger very slight indeed. This is the basis upon which the Circuit Court of Appeals places its secondary reason, which has been criticized by the petitioner.

The fact that one who is seated inside a passenger coach may occupy a very safe position and, therefore, be subject to slight risk, is no argument whatever to support the proposition that one a passenger upon the platform, running board or steps of a passenger train is not far safer than one occupying the same position when not a passenger. The petitioner says at page 7 of her brief:

> "To limit the word 'passenger' as used in the policy to 'a place of safety inside the car' or to one who has '*seated himself inside the car*', as defined by White and in the Merrill case, quoted above, is to annul the language of the policy 'in or on a public conveyance (including the platform, steps, or running board thereof)'."

The Circuit Court of Appeals definitely does not limit the use of the word "passenger" in the policy to a place of safety inside the car or to one who has seated himself inside the car. To do so would of course do violence to the terms of the policy because the policy contemplates that under certain circumstances a person may be a passenger while on the steps, platform, or running board of a train, and

one is always such in the course of either boarding or alighting from a train while on the running board, platform, or steps thereof, if the train be stopped at the proper point for taking on or discharging passengers. One attempting to board a train stopped at the station for that purpose is treated as a passenger in many instances, even before he gains contact with it, and is certainly a passenger when he is attempting to board it, and if the train starts without warning and he is injured in the course of the transaction his rights are those of a passenger. If the train here had been stopped and the decedent had been making his attempt to board it while it was stationary and had got no further on to the train than he did; and the train had started suddenly without giving him fair warning or opportunity to protect himself, his rights undoubtedly would have been those of a passenger.

II.

WITH REFERENCE TO ASSIGNMENT OF ERROR NO. 2, NAMELY, THAT THE VERDICT OF THE JURY WAS NOT SUSTAINED BY THE EVIDENCE.

As the argument addressed to this assignment is disposed of by the argument addressed to the first and third assignments of error it need not be repeated here, and we say only in this connection that the verdict of the jury is not sustained by the evidence because the evidence shows conclusively that the decedent was not a passenger at the time of his injury.

III.

WITH REFERENCE TO ASSIGNMENT OF ERROR NO. 3, -NAMELY, THAT THE COURT ERRED IN REFUSING TO GIVE TO THE JURY INSTRUCTIONS REQUESTED BY THE DEFENDANT AND APPELLANT NUMBERED 2, 4, 5, 6, 7 AND 8.

The instructions given by the court appear at pages 36, 37, 38, 39, 40 and 41 of the record. The instructions requested by the defendant and refused by the court appear at pages 42, 43 and 45 of the record, and present to the jury the question whether Walter John Aschenbrenner, the assured, had reached a place of safety and left the hazard of boarding behind him, and the jury in substance are asked to be instructed that if he did not accomplish this he was not a passenger.

Instruction No. 5 particularly sets forth the theory of the respondent, United States Fidelity & Guaranty Company. Nowhere else in the instructions is this question or theory presented to the jury. The only instruction given by the court purporting to touch upon the rules applicable to the conduct of the decedent in attempting to board a moving train was one appearing in the record commencing at the bottom of page 39 and concluding at the bottom of page 40. An examination of that instruction will show that nowhere embraced within it are the questions of the assured's reaching a place of safety or the carrier's withdrawing the invitation to board a moving train, or any of the vital rules embodied in the instructions requested by the defendant and supported by the authorities cited. This instruction of the court virtually amounted to a directed verdict for the plaintiff.

We ask that assignments II and III be considered only in the event that this court should hold the ruling of the Circuit Court of Appeals on the first assignment to be erroneous upon the merits.

To advert now to the authorities cited by the petitioner. The first of these is at page 11 of her brief—*London Guaranty & Accident Co. Ltd. v. Ladd,* 299 Fed. 562, 564. There are two companion cases, termed for brevity the *Ladd* cases. In the first case, the *London Guaranty & Accident Co. v. Ladd* case, the covering provision of the policy was as follows:

> "If such injuries are sustained while riding as a passenger in a car intended for the use of passengers and being in or upon any passenger car, or in a passenger elevator."

The injury to the insured which resulted in his death came from falling down an elevator shaft in an apartment house. The elevator was automatic and designed so that it could not be started unless all the doors were closed. There was no eye witness to the accident. The insured was found in the bottom of the shaft in the basement. The carriage was found standing at the second floor, and the door of the shaft on the first floor found to be open. The court draws the inference that the assured must have walked through the door on the first floor into the elevator shaft. The District Court Judge directed a verdict for the plaintiff in each of the *Ladd* cases for the double indemnity. With reference to the provision of the policy just quoted, the Circuit Court of Appeals says:

> "The important words are 'while riding as a passenger', * * * in a passenger elevator."

and held that the words "while riding" meant actually riding in the car, and that as he had not been riding in the car the judgment for the double indemnity on this policy was reversed.

The insuring words of the second policy in the *Preferred Accident Company v. Ladd* case were "while a passenger and is within a passenger elevator." The court points out the distinction between the word "within" and the words "while riding in" and holds that under the second policy the area covered may fairly refer to the area within the shaft, and not necessarily confined to the car or carriage, and the double indemnity was allowed to stand as to the policy involved in the second case.

In the case of *Preferred Accident Ins. Co. v. Muir*, 126 Fed. 926, cited at page 11 of petitioner's brief, the situation in substance was as follows: The double indemnity insuring provision was "if such injuries shall be received by the insured while riding as a passenger in or on a public conveyance provided by a carrier of passengers for compensation"; and another provision of the policy excepted from the coverage "injuries resulting from attempting to leave the conveyance." The decedent was admittedly a passenger, he having taken his place in the train, and as the train proceeded on he became car sick. His companion suggested that he open the window to vomit; he declined to do this and walked to the front of the car and tried the closet door and found it locked. He then opened the door on to the car platform and when last seen was apparently stooping over in the act of vomiting. He fell from the plat-

form and was killed. The car was travelling at a rate of speed between fifty and sixty miles an hour. As the court says, referring to the insuring provision above:

> "Muir's case is within the very terms of the stipulation."

Obviously he was a passenger and did not lose that attribute by going to the platform after trying the closet door for the purpose of vomiting.

If the deceased in the case at bar had ever got safely upon the train and acquired the status of a passenger and then had come to the platform for any purpose and fallen off, a very different question would have been presented.

In the case of *Berliner v. Travelers Ins. Co.*, 121 Cal. 458, cited at page 12 of petitioner's brief, the policy provided double indemnity under provision "f", as follows:

> "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam or electricity, etc."

The deceased assured was riding on a train in Mexico at the request of the superintendent, and then upon the further request of the superintendent rode upon the engine to better see the surroundings. It was held by the court that the assured did not lose his capacity or status of passenger by going upon the locomotive at the request of the authorities of the road. It then uses language highly important in the case at bar, and that language is as follows:

"If Mr. Berliner had been riding on the train in any other capacity than that of a passenger, that is, as an employee of the railroad company, or an express or mail agent, or a tramp stealing a ride upon a brake beam; the defendant would not be liable under clause 'f'. But he occupied no such relation to the railroad company or the train. Though upon the engine, he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 186; 5 Am. St. Rep. 510; McGee v. Missouri Pac. Ry. Co., 92 Mo. 208; 1 Am. St. Rep. 706; Nashville etc. R. R. Co. v. Irwin, 3 Am. & Eng. R. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word 'passenger' as here used is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point."

The cases cited in the opinion of the Circuit Court of Appeals clearly establish the principles

(1) That there must be a contract between a carrier and the person claiming to be a passenger in order to constitute the relationship of carrier and passenger.

(2) This contract may be express or implied.

(3) That when the conveyance stops at the regularly appointed place to take on persons desiring to board it and starts without warning while one other-

wise entitled to become a passenger is attempting to board it, his rights are those of a passenger.

(4) That as soon as the conveyance commences to move the implied invitation theretofore extended by the carrier, to persons to board the train is withdrawn, and one who attempts to board the train after it has commenced to move does not acquire the status of passenger thereon until he has reached a place of safety and left the hazard of the attempt behind him. If in the course of the attempt he is injured or killed, as a matter of law he is not a passenger.

To supplement those authorities we cite

Boyd v. Royal Indemnity Co., 166 N. E. 580;
Fay v. Aetna Life Ins. Co., 187 S. W. 861;
Speaks v. Metropolitan R. R. Co., 166 S. W. 864.

In the *Fay v. Aetna Life Ins. Co.* case, supra, the wording of the provision of the policy was almost identical with the wording of the policy here. It is as follows:

> "if such injuries are sustained by means as aforesaid while the assured is a passenger in or on a public conveyance provided by a common carrier for passenger service (including platform, steps or running board of railway or street railway cars) * * * the amount to be paid under Sections 1, 5 and 6 should be double the sum otherwise payable for such injuries."

There was a verdict and judgment for the plaintiff for the double indemnity and the defendant appealed. The evidence for the plaintiff tended to show in sub-

stance that while the elevated train was standing at the appointed place for taking on passengers the deceased attempted to enter the car. While he was on the step or partially on the step with the car standing still, the conductor closed the door which had been standing open, and the car went forward with the decedent hanging to the handholds with a foot on the step. He was thrown to the street below by a structure at the side of the tracks. The evidence for the defendant tended to show in substance that the plaintiff ran and tried to board a moving car after the door, through which passengers were admitted, had been closed. This obviously creates a sharp conflict in the evidence and the jury's verdict could not be disturbed. Apropos of the situation existing here, however, the court says:

> "The evidence for the plaintiff made him a passenger, whilst that for the defendant did not."

thus recognizing the rule announced in the other authorities.

In the case of *Speaks v. Metropolitan R. R. Co.*, supra, the decedent came on to the platform to board the car, ran for the car and got upon the step of the rear vestibule while the car was in motion. Shortly thereafter he was struck by a guard rail at the end of the platform and fell thirty feet to the ground and was killed. The trial court sustained a demurrer to the evidence and the court of appeals affirmed, holding among other things that the plaintiff was not a passenger, using the following language:

> "The mere fact that deceased ran or went toward and jumped or stepped on the moving

> car did not create the relation of carrier and passenger. 1 Nellis on Street Railways (2d Ed.) Secs. 249, 258. There was no evidence anywhere that there was any act indicating an acceptance of deceased as a passenger.'"

In the case of *Southern Pacific Co. v. Poole*, 160 U. S. 438, in speaking of the question of negligence, which is not involved in this case but the language is pertinent, the court says:

> "There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law."

And similarly here, where the facts are without dispute, the question whether the deceased did or did not become a passenger is a pure question of law.

The case of *Wood v. General Acc. Co.*, 156 Fed. 982, cited at page 13 of petitioner's brief, if it be any authority whatever pertinent to the question here, is authority for the position of the respondent. The court holds that a railway mail clerk is not a passenger and says further that the word "passenger" shall be given its ordinary meaning, which under the facts of that case could not possibly be other than the meaning ordinarily attached to the term when fixing the relation between a carrier and a person carrier. It is precisely that meaning which the respondent here attaches to the expression and which the Circuit Court of Appeals attached to it.

What is the plain, ordinary use of the term "passenger" with reference to carriers? It is obviously nothing more nor less than the decisions in-

volving persons and agencies who carry them determine it to be.

The case of *Aetna Life Ins. Co. v. Davis*, 191 Fed. 343, is also cited by the petitioner involved a passenger elevator and a death upon it. An examination of that case discloses that the questions there were clearly questions of fact for the jury. The elevator involved was operated by a specially selected operator from an early hour in the morning until 6:30 P. M. when it was ordinarily shut down and the operator went home. There was evidence, which was disputed, that the decedent had a special arrangement with the vice-president and general manager of the company owning the building to the effect that, twice a month when he desired to assemble certain persons in his office after the usual closing time of the elevator service, he might use this elevator and one of the janitors would act as operator. The night of the accident was one of these occasions. About 7:30 P. M. on the evening of the accident one Avery, a janitor, was operating the elevator. The decedent, Cobb, was seen to stop at the door of the elevator shaft on the fourth floor of the building. Soon after he was heard to cry out: "Oh, my God, he has crushed my foot." The janitor operating the elevator moved the elevator upward and Cobb fell into the shaft and was found dead. From the testimony of the janitor it seemed that the decedent did not actually get into the elevator, but from the physical facts it seemed that the decedent had got well into the elevator before it started. The court held under this conflict the question to be one for the jury

as to whether the decedent had become a passenger, and says:

> "If Avery's (the janitor) testimony be true, he had only offered himself as a passenger and had not in any respect entered the elevator."

The fundamental point of distinction between that case and the case at bar is that the elevator had actually stopped at the floor for the purpose of permitting the decedent to enter. If the elevator had been in motion passing an open elevator door, and Cobb had run for it in an attempt to jump into it while in motion a similar situation would have existed there as exists in the case at bar. Under such circumstances it was held that inasmuch as a jury had resolved the question upon a conflict in the evidence that the decedent was within the provisions of a policy affording double indemnity to the assured "while a passenger in an elevator provided for passenger service". No fault that we know of can be found with the ruling.

This case cites and discusses the case of *Aetna Life Ins. Co. v. Vandecar*, 86 Fed. 282 (8th Circ.), and that case has an especial bearing upon the question here. In that case an accident policy provided for double indemnity to the assured "if such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricify as a motive power the amount to be paid shall be double the sum above specified". The assured was a passenger upon a steam train. When it approached the station at which he was to alight he went on to the platform waiting for it to stop. While standing there there was a sudden lurch of the train, he was thrown to

the track, and his right hand severed above the wrist. The trial court instructed the jury as follows:

> "The court instructs you as a matter of law that a person riding upon the platform of the passenger car, as was the plaintiff, is within the provision of the policy in question which provides that if the injuries are sustained while riding as a passenger in a passenger conveyance using steam as a motive power the amount to be paid shall be double the amount specified."

The Circuit Court of Appeals reversed the judgment, holding that this instruction was error, and that the term "in a passenger conveyance" meant a position inside the car and did not extend to the platform, refusing to extend the expression "in any passenger conveyance" to include the platform.

By the same reasoning the Circuit Court of Appeals in the case at bar refused to extend the expression "while a passenger" to include one who as a matter of law was not a passenger.

The case of *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, cited by petitioner, has no direct bearing upon the controversy here. A fire insurance policy provided if "mechanics are employed in building altering, or repairing the premises named herein" without notice to or permission of the fire insurance company, its violation by the assured in permitting artisans and mechanics to come on the premises and work for a number of weeks in making repairs exonerated the company and a judgment for the plaintiff was reversed. The court uses language, however, which is important, quoting:

"If the insured cannot bring himself with the conditions of the policy he is not entitled recover for the loss."

And again:

"The compliance of the assured with the ter of the contract is a condition precedent to t right of recovery."

The court then goes on to say that when there is a ambiguity or a term used can be fairly susceptible two different constructions, that adverse to the i surance company will be adopted. It then says:

"But the rule is equally well settled that co tracts of insurance like other contracts are to construed according to the sense and meaning the terms which the parties have used, and they are clear and unambiguous their terms a to be taken and understood in their plain, ord nary and proper sense."

That is all that we contend for in the case at bar.

The case of *Mitchell v. Marker*, 62 Fed. 139, cit by respondent, has no bearing on the controversy he the court simply holding that a carrier of passenge in an elevator is subject to the same requirements the carrier of passengers on a railroad as to t degree of care extended to the persons carried.

THE DIRECTION OF THE CIRCUIT COURT OF APPEALS IS NOT IN VIOLATION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This question is elaborately reviewed in the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364. Mr. Justice Van Devanter wrote the opinion in chief, concurred in by four justices; and Mr. Justice Hughes wrote the dissenting opinion, concurred in by three justices. The force of the reasoning in the dissenting opinion in that case seems to us to be conclusive and the passage of years and the accumulation of litigation seem to have given it greater strength now than it had when first pronounced. In the case here the evidence which is without dispute supports only one possible conclusion, namely, that the assured was not a passenger at the time of his injury. The discussion of the constitutional question obviously presupposes that the ruling of the Circuit Court of Appeals upon the merits of the case is correct.

Now, if this conclusion be sound, then concededly upon the authority of the majority opinion in the *Slocum* case, the trial court, in response to the defendant's motion, should have directed a verdict in favor of the defendant United States Fidelity and Guaranty Company on the double indemnity feature of the case. Authority for this appears both in the opinion in chief and in the dissenting opinion in the *Slocum* case. The power of the Federal trial courts to direct verdicts is universally held not to encroach upon the Seventh Amendment to the Federal Constitution. It has been held not to do so because it con-

stitutes no invasion of the province of the jury for the trial court to decide questions of law.

Where the material facts are without conflict and support only one inference, or only one set of inferences, there is no question of fact to be decided and the question then becomes one purely of law. The trial court directs the jury to render its verdict a certain way, and if the verdict be not so rendered the power of the court to set it aside is unquestioned. How can it be said under such circumstances that there has in reality been a trial by jury in the trial court? True, a jury was present to try the issues of fact, if any had been presented, but when there is nothing for the jury to try, as is the case when only questions of law are presented, the jury tries nothing. It acts in effect, under such circumstances, as a pure automaton, subject to the direction of the trial judge.

If the trial judge has this power, and admittedly he has, why does not the same power vest in the appellate court? It is universally recognized that an appellate court is equally as well authorized and equipped to decide questions of law as is the trial court. What the trial judge does in directing a verdict is to try a question of law and to decide a question of law, and what the appellate court does in reviewing the action of the trial judge under such circumstances is to try a question of law and decide a question of law. To say that the trial judge has the power to determine a question of law, which is all that he does when he directs a verdict, and that this does not invade the province of the jury within the meaning of the Sev-

enth Amendment; and to say in the next breath that the appellate court is without such power is a paradox which is not understandable. The Seventh Amendment expressly reserves the right of a jury trial to a litigant where questions of fact are to be tried. It neither attempts to nor does it confer upon the jury the privilege of trying questions of law. This has always been, under the English system, the Federal system, and under the state systems, with one or two minor exceptions, such as in the law of criminal libel, which are not involved here, the function of the court.

When the trial court directs a verdict against a party he has been denied a jury trial, not in violation of any right of his, but simply because there was nothing for the jury to try. He has been denied the trial, but he has been denied no right, because nothing has been presented that gives him the right to have his cause passed upon by a jury, assuming, of course, that the trial court's direction was proper. When the jury brings in a directed verdict it has tried nothing and has in reality done nothing save act as the mouthpiece of the court. When the trial court directs a verdict in so doing it is not trying the facts. All the facts are construed against the party in whose favor the verdict is directed. The process through which the court goes under such circumstances is the determination purely of a question of law. This function, namely, the determination of questions of law is not peculiar to the trial court. It is the function of courts from the lowest to the highest, and if the trial court has such authority and is trying only a question of law when it directs a verdict, why does not the

appellate court have the same authority to direct
verdict that the trial court in the first instance sho
have directed?

The effect of the decision in the *Slocum* case is t
the trial judge has power to direct the jury upo
pure question of law, but that the appellate co
upon the selfsame question, is without such pow
The opinion in chief in the *Slocum* case concedes t
the trial court should have directed the verdict. Wh
it concedes that it but says in another way that
only question before the trial court was one of law.
the only question before that court was one of l
and that court was competent to pass upon the qu
tion of law, how can the appellate court, upon
same facts, be denied a similar right? If the acti
of the trial court in directing a verdict or in refu
ing to direct a verdict is one purely of law, how d
the function cease to become such when it is tra
ferred to the appellate court? The reasoning by wh
a contrary conclusion is arrived at is difficult to follo

The direction of a verdict and consequent jud
ment by the trial court in a proper case is just
much a denial of trial by jury as is the direction
the appellate court, which, in effect, does nothing m
than what the trial court should have done in the fi
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appellate court denies a jury trial because there

nothing to try its action is held to be a violation of the constitutional amendment. It is extremely difficult to find any basis in reason for the distinction.

In the *Slocum* case the opinion in chief mentions that if the case be sent back for a new trial the plaintiff under such circumstances might be able to strengthen his case by producing additional facts. This clearly affords to the litigant an indulgence which he is not entitled to have. If the trial court had directed the verdict in the first instance, as it should have done, upon an appeal from that judgment the action of the trial court would have been affirmed, the litigation at an end, and the plaintiff afforded no opportunity to retry his case. The mere fact that the trial court has erred should give the plaintiff no greater advantage than he would have had had the trial court properly performed its duties. The litigant should not be permitted to make capital of the error of the trial court, nor should the possibility of several trials of his action be held out to him because of this error.

The point decided in the *Slocum* case, namely that the Circuit Court of Appeals cannot reverse a judgment based upon the verdict of a jury with directions to enter a contrary judgment, has been squarely presented to the Supreme Court only once since, as far as we can ascertain from a careful examination of the decisions. It was thus presented in the case of *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511. In that case the petitioner sued one Lewellyn, Collector of Internal Revenue, to recover the sum of $246,920.18 exacted from the petitioner as a tax under the Muni-

tions Tax Act and paid under protest. A jury trial was had and a verdict was returned in favor of the petitioner for the amount prayed. The Circuit Court of Appeals reversed the judgment but did not remand the case for a new trial. This court disposes of the contention that the case should have been remanded for a new trial in the following language:

> "Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court, and not remanding the case for a new trial. There was no objection made to that action, and no request for a remand of the case; and, besides, there was nothing to retry. The case involves only propositions of law."

It is our position that the closing language of this quotation, namely, "and besides, there was nothing to retry. The case involved only propositions of law", is opposed to the ruling of the majority opinion in the *Slocum* case. While the consideration of the point is not elaborate, the facts involved, plus this statement, mean simply that the court has held that in a jury trial, where there is nothing but a question of law before the Circuit Court of Appeals, it is not necessary for it to remand a case for a new trial. The *Forged Wheel* case, being later in date, has in effect overruled the *Slocum* case. To be sure in the *Forged Wheel* case the Circuit Court of Appeals did not direct a judgment to be entered contrary to that rendered upon the verdict. The effect of the reversal, however, was the same as though it had given such a direction, because it decided as a question of law that the party who had won before the jury in the

trial court was not entitled to win, and reversed the judgment with no opportunity afforded to him to retry his case. The result reached in both cases was the same. The action of the Appellate Court in the *Slocum* case was overturned, while in the *Forged Wheel* case it was upheld.

The petitioner cites in addition to the *Slocum* case the case of *Fidelity Title & Trust Co. v. Dubois Elec. Co.*, 253 U. S. 212, as supporting its position on this point. The latter cites the *Slocum* case with approval, but the facts of the *Fidelity Title & Trust Co.* case indicate that the point originally decided in the *Slocum* case was not involved in the decision of the *Fidelity* case. In the latter case one Pancoast sued for personal injuries. The Circuit Court of Appeals set the verdict aside and ordered a new trial. A new trial was had, the plaintiff had judgment, and the Circuit Court again set aside the verdict and judgment, but this time without remanding the case for a new trial. This court, in deciding the case, says:

> "Of course, if the judgment of the Circuit Court of Appeals was right on the merits a new trial should have been ordered."

It went on, however, to review the action of the Circuit Court of Appeals, found that its decision was wrong, reversed that court upon the merits, and affirmed the judgment of the District Court for the plaintiff. Inasmuch as the real point decided in this case is that the judgment of the Circuit Court of Appeals was erroneous upon the merits, the language above quoted is dictum.

There have been various forms or procedural steps for presenting to the trial court the question whether the evidence of the plaintiff most strongly considered in his favor makes out a case for him, or whether the evidence of the defendant most strongly considered in his favor makes out a defense for him. While the forms have differed the substance and effect of the effort have always been the same, namely, to present to the trial court a question of law to be decided. Whether it be as it earlier was, by demurrer to the evidence, or whether by motion for a nonsuit or for a directed verdict, the question to be determined by the trial court was and is always one of law. We quote the language of Mr. Justice Hughes, dissenting in the *Slocum* case:

> "The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the conformity act, the provisions of the state law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials, and of thus diminishing in a highly important degree the delays and expense of litigation. It cannot be gainsaid that such a conclusion is not to be reached unless the constitutional provision compels it. I cannot see that it does compel it. On the contrary, I submit, with the utmost respect, that the Pennsylvania practice adopted by the circuit court of appeals is entirely in conformity with the 7th Amendment."

The mischief of repeated trials, to which allusion is made in this quotation, is greatly intensified under existing conditions. Litigation is multiplied, courts have become congested, litigants are being compelled to wait and to suffer onerous burdens in the way of expenses of litigation and delay, as never before.

It is conclusive, as the record now stands, that both the plaintiff and the defendant in the trial court have made their cases fully. The question has become one purely of law which the trial court should have so held, but which, because it did not do so, a retrial must be had and a new opportunity given to the trial court to so hold; when the Circuit Court of Appeals, clothed with equal, if not greater power upon questions of law, is entirely competent itself to decide the point.

Under the theory of the *Slocum* case where is litigation logically to terminate? Suppose that the case at bar should go back for a new trial and the evidence show without dispute the effort of the decedent assured to board a train in motion when he made the attempt, and, therefore, as a matter of law he had not become a passenger upon it. If the Circuit Court of Appeals is without the power at the present time to direct a judgment upon the double indemnity feature simply because a jury happens to have been present, and if the trial court should be of the opinion that the Circuit Court of Appeals was wrong it could again submit the case to the jury to have determined whether the deceased was a passenger at the time of the accident, and if the jury should

find the deceased to be a passenger, the case would be appealed again to the Circuit Court of Appeals, a reversal would result, and so an endless chain of litigation be commenced which would eventually bankrupt one or the other of the litigants.

It is no answer to this statement to say that the trial court might not do this. The test is not of possibilities but of power. If it has the power to do it, and the Circuit Court of Appeals is without power to prevent it from doing this, it will have to be assumed that it will do it. The vice of the principle lies in the confessed impotence of an appellate court, where only questions of law are involved, to control the action of the subordinate court.

The state of the law of California with respect to the situation when the Circuit Court of Appeals pronounced its judgment was as follows: In 1923 the Legislature of California adopted Section 629 of the Code of Civil Procedure. That section is as follows:

> "Judgment notwithstanding verdict. When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
>
> A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on

motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the order denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

From this it is clear that the Appellate Court may order judgment notwithstanding the verdict to be entered when it appears from the whole evidence that a verdict should have been so directed at the trial. The Supreme Court of California construed this section in *Bolar v. Maxwell Hdw. Co.*, 205 Cal. 396. The action there was for negligence and there was a motion for a directed verdict by the defendant, which motion was denied. No motion, however, was made for a judgment notwithstanding the verdict, but the Supreme Court, in the absence of such a motion, construed the section to confer upon it authority to reverse and direct the trial court to enter judgment for the defendant because it found that the motion for a directed verdict should have been granted.

It has been held in California that trial by jury is a matter of right on proceedings for partial distribution in the estate of a decedent.

Estate of Baird, 173 Cal. 617.

In such a proceeding, even before the adoption of Section 629 of the Code of Civil Procedure, the Supreme Court of the state reversed a judgment of the trial court based upon a general and upon special

verdicts of the jury in favor of one petitioning for partial distribution claiming to be an adopted son. The Supreme Court made the following order:

> "It is ordered, adjudged and decreed by the Court that the decree of Partial Distribution of the Superior Court in and for the City and County of San Francisco in the above entitled cause be and the same is hereby reversed and the trial court is ordered and directed to set aside the special verdicts and findings and to enter judgment for appellants denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased."
>
> *Estate of Baird*, 182 Cal. 338.

It is clear from this section and these decisions that the practice in California at the time that the Circuit Court of Appeals in the case at bar rendered its decision, clearly conferred upon the state appellate courts the power to make such an order as did the Circuit Court of Appeals make here. The Circuit Court of Appeals then was doing no more than following the California procedure, which, unless its action did violence to the 7th Amendment to the Federal Constitution, it was clearly entitled to do.

Conformity Act, Revised Statutes, Sec. 914.

We appreciate that the 7th Amendment to the Federal Constitution has been held to be binding only upon the Federal Courts. For that reason decisions respecting the power of the state courts are not strictly in point. However, we believe the question involved to be so closely related in its fundamentals to similar questions involving the power of state courts, that we have cited some of the principal authorities which hold that state courts in a situation similar to the one existing here have the constitutional right to direct the trial court, even after judgment upon a verdict, to enter a contrary judgment where the question involved is only one of law; and some of the cases go even further and confer the power where the question is as to the weight of the evidence.

Gunn v. Union Railway Co. (R. I.), 62 Atl. 118;

Central R. R. & Banking Co. v. Kent (Ga.), 18 S. E. 850;

Musser v. Harwood, 23 Mo. App. 495;

Brownsville v. Basse (Texas), 43 Tex. 440;

Borg v. Chicago, R. I. & P. Ry. Co. (Ill.), 44 N. E. 722.

In *Borg v. Chicago, etc.*, supra, the court says:

> "But when with all the advantages accorded to them it appears to the appellate court that there cannot be a recovery which should be allowed to stand, no constitutional right is invaded by a refusal to remand the case for successive trials which must necessarily be followed by successive refusals."

These cases, as does the dissenting opinion in the *Slocum* case, emphasize that the bases of the question, which lie deeper than the wording of the constitutional provisions involved, and rest upon the fundamentals of human right and of sovereign obligation, and further emphasize that no such right is invaded

and no such obligation shirked by denying the right of trial by jury where there is nothing for the jury to try. We respectfully ask, therefore, that the judgment of the Circuit Court of Appeals be affirmed.

Dated, San Francisco, California,
February 2, 1934.

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